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CITATIONS

534500—43

In the Supreme Court of the United States

OCTOBER TERM, 1943

No. —

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

LANE-WELLS COMPANY, A CORPORATION, AND TECHNICRAFT ENGINEERING CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of Guy T. Helvering, Commissioner of Internal Revenue, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Ninth Circuit entered in this case.

OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 47–85) is reported at 43 B. T. A. 463. The opinion of the Circuit Court of Appeals on petition for rehearing (R. 277–282) is reported in 134 F. 2d 977.

JURISDICTION

The judgment of the Circuit Court of Appeals on petition for rehearing was entered on March 22,

1943 (R. 283). The jurisdiction of this Court is invoked under Section 240 (a) of the Judiical Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The taxpayer filed corporate income tax returns on Form 1120 but did not file personal holding company returns on Form 1120-H as specifically required by Treasury regulations. The question is whether there was a "failure to file a return" within the meaning of Sections 276 (a) and 291 of the Revenue Acts of 1934 and 1936, with the consequence that an assessment for personal holding company tax may be made at any time, and a 25% penalty was incurred.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved may be found in the Appendix, *infra*, pp. 8–14.

STATEMENT

The Lane-Wells Company, a Delaware corporation, was organized in 1937 to take over the business of Technicraft Engineering Corporation and its affiliated companies. In 1937, following a reorganization in which Lane-Wells Company of Delaware acquired the stock of the Technicraft Corporation, the latter conveyed all its assets to the Delaware corporation and was dissolved. (R. 60–63.) It has been stipulated that Lane-Wells Company is liable as transferee for any taxes found due from the Technicraft Corporation (R. 65).

For the years 1934, 1935, and 1936 Technicraft Corporation timely filed the usual corporation income tax returns on Form 1120 (R. 63). It did not file personal holding company surtax returns on Form 1120 H for any of those years (R. 64).

Technicraft's 1934 corporate return showed gross income from royalties of $27,125.23, deductions of $11,392.24, and net income of $15,732.99. Its 1935 return showed "gross profits where inventories are not an income-determining factor" of $69,577.19, a discount of $13.90, a gross income of $69,591.09, and after deductions a net income of $48,028.20. Its 1936 return showed a gross income of $148,527.82, consisting of $822.01 interest, $2,500 rents, and $145,113.73 royalties, less a discount of $92.08, and after deductions a net income of $111,460.51. In these returns it stated its business variously as "engineering," "engineering development," and "research and engineering." (R. 63–64.)

On June 1, 1939, the Commissioner determined that the Technicraft Corporation was a personal holding company in the years in question (deriving more than 80% of its income from royalties) and ascertained deficiencies accordingly (R. 32–45). Petitions were filed with the Board of Tax Appeals contending that the amounts of Technicraft's income designated on its income tax returns as "royalties" were in fact compensation for tangible services rendered to affiliated corpora-

tions and did not constitute "personal holding company" income (R. 66).

The Board of Tax Appeals held that a considerable part of Technicraft's gross income obviously accrued from royalties and that it would be necessary to sustain the Commissioner's determination in the absence of a showing by the taxpayer that more than 20% accrued from other sources (R. 65–72). The Board also held that the deficiency notices were timely because failure to file the personal holding company surtax returns for those years prevented the running of the period of limitations (R. 79–84). The Board further held that the imposition of the 25% penalty for failure to file personal holding company returns was mandatory (R. 84–85).

Upon consolidated appeals (R. 262–264) the court below sustained the Board in its decision that the Technicraft Corporation was a personal holding company (R. 281) but reversed its decision as to the timeliness of the deficiency notices and the imposition of the penalty (R. 277–283).[1]

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred in holding that the filing of corporate income tax returns on

[1] It was not questioned that the 1936 assessment was made within the statutory time limit and the Circuit Court of Appeals did not disturb it. Despite the holding that the deficiency notice for 1935 against Technicraft was untimely, the court below gave effect to the additional year allowed for assessments against transferees and held that the proceedings were timely with respect to Lane-Wells.

Form 1120 was sufficient to start the running of the period of limitations against assessment of personal holding company surtax and that such filing prevented the imposition of the statutory penalty for failure to file personal holding company surtax returns on Form 1120 H.

REASONS FOR GRANTING THE WRIT

The decision of the court below, to the effect that a corporate income tax return on Form 1120 was a sufficient return for the purpose of starting the running of the period of limitations and for avoiding the statutory penalty, is in conflict with the following decisions: *O'Sullivan Rubber Co.* v. *Commissioner,* 120 F. 2d 845 (C. C. A. 2d); *Lone Pine Lawn Corp.* v. *Helvering,* 121 F. 2d 935 (C. C. A. 2d); *R. Simpson & Co.* v. *Helvering,* 128 F. 2d 742 (C. C. A. 2d), certiorari granted June 7, 1943, No. 419, October Term, 1942; *Logan Coal & Timber Ass'n* v. *Helvering,* 122 F. 2d 848 (C. C. A. 3d). The decision below is also contrary to the principles expressed by the Circuit Court of Appeals for the Fourth Circuit in *Blenheim Co.* v. *Commissioner,* 125 F. 2d 906.

The granting of the writ in the *Simpson* case, *supra,* will involve a consideration of the effect of a failure to file a return on Form 1120 H, and petitioner in that case relied upon a conflict with the decision below.

The court below failed to give effect to the fact that the filing of returns on Form 1120 H was specifically required. Section 351 (c) of the Reve-

nue Acts of 1934 and 1936 (Appendix, *infra*) makes Section 54 applicable to the surtax on holding companies, and Section 54 authorizes the regulation requiring this additional return for personal holding companies. The legislative background of Section 351 is even more explicit. It is said in H. Conference Rep. No. 1385, 73d Cong., 2d Sess., p. 20 (1939–1 Cum. Bull. (Part 2) 627, 630, 631): "The Senate amendment provides for a separate return for the purposes of this surtax on personal holding companies. * * * The House recedes on amendment no. 45."

Treasury Regulations 86 and 94, Article 351–8 (Appendix, *infra*), prescribed this return, and the requirement was continued in Regulation 103, Sec. 19.508–1, promulgated under the Internal Revenue Code; those regulations may thus be deemed to have Congressional approval. *Helvering* v. *Winmill*, 305 U. S. 79.

Form 1120 H is not merely a supplementary sheet to the income tax return but a separate and distinct return for surtax purposes. Surtax on a personal holding company is laid on the "undistributed adjusted net income" as defined in Section 351 (b) (2) (3) of the Revenue Acts of 1934 and 1936. And Form 1120 H calls for critical information regarding liability for the personal holding company tax that does not appear on the usual corporate return. Unless Form 1120 H were filed, the Commissioner might never learn

that the corporation were even subject to the personal holding company tax.

In the light of the legislative history, and the cases cited above, the regulations involved cannot be considered unreasonable, and this case is distinguishable from *Germantown Trust Co.* v. *Commissioner*, 309 U. S. 304, where only one return was required.

Moreover, if the principle announced by the court below is to be generally followed, there would be a premium upon failure to file personal holding company returns. Under the decision below, the filing of corporate income tax returns would suffice to avoid the statutory penalty, and the delay caused by the failure to file Form 1120 H might well bar the collection of the unreported tax.

CONCLUSION

It is, therefore, respectfully submitted that this petition should be granted.

CHARLES FAHY,
Solicitor General.

JUNE 22, 1943.

APPENDIX

Revenue Act of 1934, c. 277, 48 Stat. 680:

SEC. 54. RECORDS AND SPECIAL RETURNS.

(a) *By Taxpayer.*—Every person liable to any tax imposed by this title or for the collection thereof, shall keep such records, render under oath such statements, make such returns, and comply with such rules and regulations, as the Commissioner, with the approval of the Secretary, may from time to time prescribe.

SEC. 62. RULES AND REGULATIONS.

The Commissioner, with the approval of the Secretary, shall prescribe and publish all needful rules and regulations for the enforcement of this title.

SEC. 275. PERIOD OF LIMITATION UPON ASSESSMENT AND COLLECTION.

Except as provided in section 276—

(a) *General Rule.*—The amount of income taxes imposed by this title shall be assessed within three years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period.

SEC. 276. SAME—EXCEPTIONS.

(a) *False Return or No Return.*—In the case of a false or fraudulent return with intent to evade tax or of a failure to file a return the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time.

SEC. 291. FAILURE TO FILE RETURN.

In case of any failure to make and file a return required by this title, within the time prescribed by law or prescribed by the Commissioner in pursuance of law, 25 per centum of the tax shall be added to the tax, except that when a return is filed after such time and it is shown that the failure to file it was due to reasonable cause and not due to willful neglect no such addition shall be made to the tax. The amount so added to any tax shall be collected at the same time and in the same manner and as a part of the tax unless the tax has been paid before the discovery of the neglect, in which case the amount so added shall be collected in the same manner as the tax. The amount added to the tax under this section shall be in lieu of the 25 per centum addition to the tax provided in section 3176 of the Revised Statutes, as amended.[1]

SEC. 351. SURTAX ON PERSONAL HOLDING COMPANIES.

* * * * *

(b) *Definitions.*—As used in this title—

(1) The term "personal holding company" means any corporation (other than a corporation exempt from taxation under section 101, and other than a bank or trust company incorporated under the laws of the United States or of any State or Territory, a substantial part of whose business is the receipt of deposits, and other than a life-insurance company or surety company)

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[1] The computation of the percentage of penalty under this action was changed in a manner not material in the instant case by Section 406 of the Revenue Act of 1935, c. 829, 49 Stat. 1014.

if—(A) at least 80 per centum of its gross income for the taxable year is derived from royalties, dividends, interest, annuities, and (except in the case of regular dealers in stock or securities) gains from the sale of stock or securities, and (B) at any time during the last half of the taxable year more than 50 per centum in value of its outstanding stock is owned, directly or indirectly, by or for not more than five individuals. For the purpose of determining the ownership of stock in a personal holding company—(C) stock owned, directly or indirectly, by a corporation, partnership, estate, or trust shall be considered as being owned proportionately by its shareholders, partners, or beneficiaries; (D) an individual shall be considered as owning, to the exclusion of any other individual, the stock owned, directly or indirectly, by his family, and this rule shall be applied in such manner as to produce the smallest possible number of individuals owning, directly or indirectly, more than 50 per centum in value of the outstanding stock; and (E) the family of an individual shall include only his brothers and sisters (whether by the whole or half blood), spouse, ancestors, and lineal descendants.

* * * * *

(c) *Administrative Provisions.*—All provisions of law (including penalties) applicable in respect of the taxes imposed by Title I of this Act, shall insofar as not inconsistent with this section, be applicable in respect of the tax imposed by this section, except that the provisions of section 131 of that title shall not be applicable.

Treasury Regulations 86, promulgated under the Revenue Act of 1934:

> ART. 291–1. *Addition to the tax in case of failure to file return.*—In case of failure to make and file a return required by Title I within the prescribed time, 25 percent of the amount of the tax is added to the tax unless the return is later filed and failure to file the return within the prescribed time is shown to the satisfaction of the Commissioner to be due to reasonable cause and not to willful neglect. Two classes of delinquents are subject to this addition to the tax:
>
> (*a*) Those who do not file returns and for whom returns are made by a collector or the Commissioner, and
>
> (*b*) Those who file tardy returns and are unable to show reasonable cause for the delay.
>
> A taxpayer who files a tardy return and wishes to avoid the addition to the tax must make an affirmative showing of all facts alleged as a reasonable cause for failure to file the return on time in the form of an affidavit which should be attached to the return. If such an affidavit is furnished with the return or upon the collector's demand, the collector, unless otherwise directed by the Commissioner, will forward the affidavit with the return, and, if the Commissioner determines that the delinquency was due to a reasonable cause and not to willful neglect, the 25 percent addition to the tax will not be assessed. If the taxpayer exercised ordinary business care and prudence and was nevertheless unable to file the return in the prescribed

time, then the delay is due to reasonable cause.

If the 25 percent addition to the tax for delinquency in filing the return has been added, the amount so added shall be collected in the same manner as the tax.[2]

* * * * *

ART. 351-1. *Surtax on personal holding companies.*—Section 351 of Title IA imposes an additional graduated income tax or surtax upon corporations classified as personal holding companies. Corporations so classified are exempt from the surtax on corporations improperly accumulating surplus imposed by section 102 of Title I, but are not exempt from the other taxes imposed by that title. Unlike the surtax imposed by section 102, the surtax imposed by section 351 applies to all personal holding companies defined as such in article 351-2 regardless of whether or not they were formed or availed of to accumulate gains and profits for the purpose of avoiding surtax upon shareholders.

ART. 351-8. *Return and payment of tax.*—A separate return is required for the surtax imposed under section 351. Such return shall be made on Form 1120 H. In the case of a personal holding company which is a domestic corporation, the return is required to be made within the time prescribed in section 53 and in the case of a foreign corporation within the time prescribed in section 235. The tax shown by

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[2] To accord with Section 405 of the Revenue Act of 1935, this article was amended in a manner not here material by T. D. 4626, XV-1 Cum. Bull. 61, 76-77 (1936).

the corporation on its return must be paid in the case of a domestic corporation within the time prescribed in section 56 and in the case of a foreign corporation within the time prescribed in section 236. The same provisions of law relating to the period of limitation for assessment and collection which govern the taxes imposed by Title I also apply to the surtax imposed under Title IA. However, since the surtax imposed under Title IA is a distinct and separate tax from those imposed under Title I, the making of a return under Title I will not start the period of limitation for assessment of the surtax imposed under Title IA. If the corporation subject to section 351 fails to make a return, the tax may be assessed at any time. If the Commissioner finds a deficiency in respect of the tax imposed by section 351, he is required to follow the same procedure which applies to deficiencies in income tax under Title I. The penalties applicable to the income taxes imposed under Title I, as well as the provisions of Title I relating to interest and additions to the tax, also apply to the surtax imposed by section 351. The administrative provisions applicable to the surtax imposed by section 351 are not confined to those contained in Title I but embrace all administrative provisions of law which have any application to income taxes.

The corresponding sections of the Revenue Act of 1936, c. 690, 49 Stat. 1648, are identical except Section 291, which provides that the penalty may be lifted by a showing that the failure to file a return on time was due to reasonable cause and

not to willful neglect; and that this showing may be made even though no tardy return has been filed. Treasury Regulations 94, promulgated under the Revenue Act of 1936, Article 291–1 (as amended by T. D. 5058, 1941–2 Cum. Bull. 156) made the same change. The remaining corresponding articles of Treasury Regulations 94 are identical with those of Regulations 86 set out above.

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